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No. 627

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE P. PORTER, State Auditor and ex officio Investment Commissioner of the State of Montana, Appellant

vs.

INVESTORS SYNDICATE, a corporation, Appellee.

BRIEF ON REHEARING

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NAEGELE PRINTING CO., HELENA, MONT.

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BRIEF ON REHEARING

The sole ground of the motion for rehearing in this case is set forth on page two of the Petition for Rehearing as follows:

> "Section 29 of Article III of the Montana Constitution provides:
>
> > 'The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

> "As this Court has decided that the power sought to be conferred upon the Court by Section 4038 as amended is not judicial but administrative, said section is clearly violative of Section 1 of Article IV of the Montana Constitution."

Petitioner cites In re Weston, 28 Mont., 207, 219. This was a case where the legislature attempted to make it imperative on the Supreme Court to disqualify certain judges of the state on the presentation of an affidavit and it was held:

> "Under Constitution, Article IV, Section 1, the legislature cannot impose upon the supreme court, or its justices, the performance of an act not judicial in its character but *purely* ministerial or executive."

The distinction between the Weston case and this case is that the function to be performed by the courts of Montana in case of an appeal thereto from the decision of the Commissioner is not *purely* legislative or ministerial.

The question involved in the petition for rehearing is: Will the Courts of Montana assume jurisdiction of a case where they must perform legislative as well as judicial functions. The principle has been decided by the Montana Supreme Court in O'Neil vs. Yellowstone Irrigation District, 44 Mont. 506-507.

> "It is undoubtedly true that no case can be found in which a statute imposing purely legis-

lative functions upon courts has been upheld; but, as shown by the cases cited, where the principal power conferred is judicial in character, the fact that the exercise of the power so conferred may incidentally require *the exercise also of legislative or administrative functions* does not impair the validity of the legislation conferring it. The duty to determine the propriety of establishing irrigation districts, resting, as it does, upon public necessity, appertains exclusively to the law-making body. So, also, the mode by which they may be organized must be determined by it. But the ascertainment of the necessity or utility of establishing a particular district, as well as the solution of the question whether the conditions precedent have been complied with, involve judicial functions, the exercise of which is properly left to the courts. It is sufficient to sustain the law if the general power conferred is judicial, though it incidentally requires the performance of legislative and administrative duties. (State vs. Barker, 116 Iowa, 96, 93 Am. Rep. 222, 89 N. W. 204, 57 L. R. A. 244; Sanderlin v. Luken, supra; State ex rel. Matson v. Superior Court, supra)".

Does the appellee and petitioner have the right to a preliminary injunction on appeal to the Courts of Montana.

This question has likewise been decided by the Supreme Court of Montana in State vs. District Court, 53 Mont. 229.

"Has the district court in this class of cases jurisdiction to use the provisional remedy of injunction *in limine* to suspend an order or regulation made and promulgated by the board pending a final determination of the action in which a review of the order is sought."

This case reviewed the action of the railroad commission in establishing certain rates for railroads.

"The board is vested with very extensive powers and duties. Among numerous others it has power, and it is its duty, to establish and promulgate fair and just rates and charges for the transportation of passengers and freight by railroads operating in this state; to prevent extortion and unjust discrimination in this behalf, and to compel all such railroads to provide and maintain train service for both passengers and freight, * * *"

"Section 4384 confers upon the district court of the proper county jurisdiction to review any determination of the board 'fixing any classification, rate, toll, charge, regulation, or order,' or its refusal to make, fix or establish such classification, rate, etc. The action must be commenced by the filing of a complaint in the proper county, and the defendant must be served with summons as in an ordinary action, or with an order of court fixing a reasonable time within which appearance may be made, not less than five days. The issues are made up by answer. If the court finds the order classification, rate, toll, charge, regulation, or

establishing the classification, rate, etc., to be unjust and unreasonable, *it becomes the duty of the board to revise it.* Section 4390 authorizes any railroad deeming a classification, rate, toll, etc., established by the board to have its determination reviewed."

"Section 4390 contains two provisos, viz: 'That until the final decision in any such action the order of the board affecting rates or charges shall be deemed to be final and conclusive: And provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls, charges, regulations and orders made, fixed and established by said board shall *prima facie* be deemed to be just, reasonable and proper."

"Though the determinations of the board are *prima facie* just and reasonable, this furnishes no compelling reason why the presumption in their favor *may not be so satisfactorily overcome by evidence on the hearing of the application that the court would be constrained to grant relief,* just as it would in any other case. Inasmuch as the jurisdiction conferred is general, except so far as the legislature has expressly restricted it, we do not think that this court should impose any other restriction. It may be that the legislature should have imposed the same restriction as to all orders. This was for that body to determine, and not for the court. Doubtless it deemed it better to leave the whole matter to the exercise of a wise judicial discretion, anticipating that cases might

> arise in which the order complained of would be so clearly oppressive that immediate relief from it would be imperative. It may be assumed that, since the legislature has expressly declared that all the determinations of the board are to be deemed prima facie just and reasonable, the court should exercise its discretion with reserve and caution. This consideration, however, is one affecting the mode of exercising the jurisdiction conferred, and is not pertinent to the inquiry whether the legislature intended to confer it."

The language of the statute in question in this case is Section 4038, as amended by Chapter 194 of the Session Laws of 1931. So far as it pertains to the matter of preliminary injunction is:

> "Pending any such action, the said findings or decision of said commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and pending any such action the said findings or decision of the commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

The concluding words of the paragraph "If no action has been brought to set aside said findings or decision within thirty days, the same shall become final and binding" clearly convey the impression that the findings and decision of the commissioner shall not become final and binding for

thirty days, and then only in the event that the action has not been brought. The effect of the words "pending any such action said findings and decision shall be prima facie evidence", have no force as against a preliminary injunction as was decided in the case of State vs. District Court, above quoted from.

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